Comment

THE JOINT NEWSPAPER OPERATING CASE: A FACELIFTING FOR THE FAILING COMPANY DOCTRINE

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The United States Supreme Court, in *Citizen Publishing Co. v. United States*,[1] held that the operation of two newspapers under a joint operating agreement which allowed the newspapers to set prices, pool profits, and divide the local newspaper market between them was a violation of the Sherman[2] and Clayton Acts.[3] When the action was initially filed in 1965, speculation concerning the eventual outcome of the dispute sparked the interest of commentators,[4] Congress, and the 42 similarly situated newspapers in 21 cities across the country.[5] In 1967, Senate Bill 1312,[6] which would exempt newspapers from antitrust sanctions for combining under a joint operating agreement, was proposed by fifteen senators of

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[1] 394 U.S. 131 (1969), *aff'g* 280 F. Supp. 978 (D. Ariz. 1968).

[2] The relevant portions of the Sherman Act §§ 1 and 2, 15 U.S.C. §§ 1 and 2 (1964), are as follows:

> Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .
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> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . .

[3] Section 7 of the Clayton Act, 15 U.S.C. § 18 (1964), states in pertinent part:

> Section 7. No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

[4] *See, e.g.*, Flynn, *Antitrust and the Newspapers: A Comment on S. 1312*, 22 VAND. L. REV. 103 (1968); Mahaffie, *Mergers and Diversification in the Newspaper, Broadcasting and Information Industries*, 13 ANTITRUST BULL. 927 (1968); Roberts, *Antitrust Problems in the Newspaper Industry*, 82 HARV. L. REV. 319 (1968).

[5] Chronologically, the cities which contain newspapers with joint operating agreements are: Albuquerque, N.M., 1933; El Paso, Tex., 1936; Nashville, Tenn., 1937; Evansville, Ind., 1938; Tucson, Ariz., 1940; Tulsa, Okla., 1941; Madison, Wis., 1948; Fort Wayne, Ind., 1950; Bristol, Tenn.-Va., 1950; Birmingham, Ala., 1950; Lincoln, Neb., 1950; Salt Lake City, Utah, 1952; Shreveport, La., 1953; Franklin-Oil City, Pa., 1956; Knoxville, Tenn., 1957; Charleston, W. Va., 1958; Columbus, Ohio, 1959; St. Louis, Mo., 1959; Pittsburgh, Pa., 1961; Honolulu, Hawaii, 1962; San Franciso, Cal., 1965; and Miami, Fla., 1966. *Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 355 (1969) (statement of M.J. Levin) [hereinafter cited as *Senate Hearings on S. 1520*].

[6] S. 1312, 90th Cong., 1st Sess. (1967).

diverse ideologies.[7] Extensive hearings were held on the bill, known as the "Failing Newspaper Act,"[8] before the Senate Subcommittee on Antitrust and Monopoly in 1967-68,[9] and in 1968 a similar bill was introduced in the House of Representatives.[10] As amended, S. 1312 was reported favorably from the Senate antitrust subcommittee late in 1968—too late for action by the 90th Congress. However, in the 91st Congress the Senate passed a slightly amended bill, S. 1520, but the House has yet taken no action, thus leaving unsettled the position of the remaining newspapers who currently operate under joint operating agreements. The purpose of this comment is to explore the ramifications of *Citizen Publishing* in an effort to determine the soundness of the decision in legal and economic terms and to speculate about the effects of the allegedly salutary proposals which are pending in Congress.

To aid in understanding the effect of the Supreme Court's decision on existing antitrust law and its potential effect on newspapers, future action by the Justice Department,[11] and pending federal legislation, the factual and legal background of the litigation must be examined.

Background

The Facts[12]

Because of financial difficulties, the number of existing newspapers near the turn of the century began to decline even though the population of the country was increasing.[13] This trend of disappearing newspapers

[7] S. 1312 was introduced by Senators Hayden and Fannin of Arizona, Kuchel of California, Hartke and Bayh of Indiana, Bennett and Moss of Utah, Fong and Inouye of Hawaii, Monroney and Harris of Oklahoma, Randolph of West Virginia, Thurmond of South Carolina, Tower of Texas, and Scott of Pennsylvania. *See* Flynn, *supra* note 4, at 103.

[8] *Id.* Section 1 provides, in part: "This act may be cited as the 'Failing Newspaper Act'." However, one opponent has referred to the bill as "the millionaire crybaby publishers' bill." *Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 1, at 26 (1967) (statement of Eugene Cervi, editor and publisher of Cervi's Rocky Mountain Journal) [hereinafter cited as *Senate Hearings on S. 1312*].

[9] *Senate Hearings on S. 1312, supra* note 8.

[10] H.R. 19123, 90th Cong., 2d Sess. (1968). It is interesting to note that the advocates of the bill adopted a more positive approach with H.R. 19123. Unlike S. 1312, H.R. 19123 was called "The Newspaper Preservation Bill." In the 91st Congress, there have been a total of 29 "Newspaper Preservation Bills" introduced—one in the Senate (S. 1520) and the remaining 28 in the House of Representatives (H.R. 279, 5199, 6392, 6967, 7477, 7740, 8310, 8747, 8765, 8766, 8767, 8768, 8769, 8779, 8787, 9268, 9336, 9470, 9718, 9845, 9867, 10348, 10459, 10511, 10558, 11107, 11641, and 12141). CCH 91st Cong. Index 251 (1969-70).

[11] Specialists in antitrust practice and litigation were no doubt very interested in the effect of the Supreme Court's decision on other areas of antitrust law. For example, in the large enterprise sector, fear of antitrust action has depressed the selling price of the common stock of some conglomerates since late February 1969. Bus. Week, Mar. 8, 1969, at 29.

[12] Unless otherwise indicated, all facts are from United States v. Citizen Publishing Co., 280 F. Supp. 978 (D. Ariz. 1968).

[13] For a statistical history of newspapers, see Flynn, *supra* note 4, at 104, and sources cited therein.

has continued up to the present time. The situation in Tucson, Arizona, was no exception. In the eight years prior to the operating agreement (1932-1940), Citizen Publishing Co. (Citizen) operated at a loss and was unable to pay a dividend to its stockholders.[14] However, during this same eight-year period, Star Publishing Co. (Star) operated at a profit and its position in the Tucson newspaper market was constantly improving.[15]

In 1936, William A. Small, Sr., and William H. Johnson contracted to purchase the stock of Citizen for $100,000. In addition, Small and Johnson invested $25,000 of their own money as working capital for Citizen.[16] Even though the circulations of the two newspapers were about equal between 1935 and 1939, Star sold 50 percent more advertising,[17] thus explaining the differences in the profitability of the two companies during this period.[18]

In 1936 in this economic atmosphere, discussions were begun concerning the possibility of merging the two papers or operating them under a joint agreement.[19] The parties opted for the latter and on March 28, 1940, Star and Citizen entered into a joint operating agreement with operations to begin on July 1, 1940. The operation was to continue for 25 years and could be cancelled by mutual assent. Each newspaper retained its separate identity and separate news and editorial departments; only the business functions of printing, circulation, and advertising were merged, including fixing of advertising and circulation rates. To this end, Tucson Newspapers, Inc. (TNI) was formed to manage and operate all business operations. All revenues from advertising and circulation were paid into TNI, which then deducted its costs and distributed the remainder to Star and Citizen at a fixed ratio. The parties agreed that Star and Citizen,

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14 Brief for Defendant at 11, United States v. Citizen Publishing Co., 280 F. Supp. 978 (D. Ariz. 1968).

15 Brief for Defendant at 12.

16 *Id.* At this time, Small, Sr., owned 25 percent of the Citizen and Johnson had a 75 percent interest. But between 1936 and 1939 the respective interests changed: Small and his wife acquired a 75 percent interest and Johnson retained the remaining 25 percent. It was during this period (1936-1939) that "Small increased his investment in the Citizen, moved from Chicago to Tucson, and was prepared to finance the Citizen's losses for at least a while from his own resources." Citizen Publishing Co. v. United States, 394 U.S. 131, 133 (1969).

17 The district court found that Star sold 50 percent more advertising during this period, 280 F. Supp. 978, 980 (D. Ariz. 1968) (finding 13). The defendant, however, claimed that Star had two-thirds of the advertising in 1938. Brief for Defendant at 12, United States v. Citizen Publishing Co., 280 F. Supp. 978 (D. Ariz. 1968).

18 A modern parallel situation occurred in 1963 with the demise of the New York Mirror which had the second largest circulation in the United States. Its financial difficulties stemmed from the fact that it had only 4.1 percent of the advertising market in New York City during the six months prior to its failure. *Senate Hearings on S. 1312, supra* note 8, pt. 2, at 938 (1967).

19 The district court found that the discussions were initiated by Star. 280 F. Supp. at 980. However, there was testimony at the trial by one of the owners of Star that Mr. Johnson of Citizen initiated the discussions. Defendants' Objection to Plaintiff's Proposed Findings of Fact at 3, United States v. Citizen Publishing Co., 280 F. Supp. 978 (D. Ariz. 1968).

as well as their stockholders, officers and executives would not engage in any business in Pima County which was in conflict with the agreement;[20] this had the effect of allocating the evening and morning newspaper markets. Moreover, the parties executed a stock option which was to be considered part of the agreement and provided that if the stockholders of either corporation decided to sell, the other stockholders would have first option to purchase.

During the period of operation under the agreement the combined revenues rose from $519,000 in 1940 to $8,650,000 in 1954—over 1500 percent. In the same period combined net income also rose from $27,000 to over $1.7 million. The operating agreement proved so successful that in 1953 the parties agreed to a 25-year extension of the original agreement—from 1965 to 1990.

Near the end of the original term, Star stockholders were offered approximately $10 million by the newspaper chain of Brush-Moore Newspapers, Inc. Fearing that they would not be able to work with Brush-Moore under the operating agreement, Citizen stockholders elected to exercise their stock option, and, as a vehicle to acquire Star, formed Arden Publishing Co. (Arden) with William A. Small, Jr., as the sole stockholder. On December 21, 1964, Arden exercised the option and on January 4, 1965, the Justice Department filed suit against Citizen,[21] alleging violation of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act.

The Legal Principles

Since it is well established that the commerce clause embraces local dissemination of national or international news as well as local advertisement of products from other states or countries,[22] the Sherman Antitrust Act and the Clayton Act are applicable to newspapers. The mere fact that newspaper publishers are involved with first amendment rights and are not involved primarily in the sale of tangible goods does not afford

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[20] Tucson is located in Pima County, the state's second most populous county.

[21] Named as defendants in the Government's complaint were Citizen Publishing Co., Star Publishing Co., Tucson Newspapers Inc., Arden Publishing Co., and William A. Small, Jr. On January 5, 1965, the district court denied the Justice Department's motion to enjoin the acquisition, but before the acquisition was consummated, attorneys for Citizen met with Justice Department attorneys to declare their intent to dispose of Star as soon as an acceptable buyer could be found. Brief for Defendant at 2, 73, United States v. Citizen Publishing Co., 280 F. Supp. 978 (D. Ariz. 1968). Shortly after the acquisition was consummated, however, the Justice Department obtained an injunction which prohibited the divestiture of Star until after the trial apparently to keep the section 7 action from becoming moot. This injunction was later amended on March 31, 1965, to permit the liquidation of Star into Arden. Brief for Defendant at 74.

[22] Lorain Journal v. United States, 342 U.S. 143 (1951); *accord*, Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U.S. 268 (1934). *See also* Associated Press v. United States, 326 U.S. 1 (1945).

them any special antitrust exemption.[23] Indeed, in the leading case of *Associated Press v. United States*,[24] the Court rejected this very argument, concluding that the first amendment not only does not exempt newspapers from antitrust laws, but that it provides a basis for antitrust actions against newspapers.[25]

Although conceptually an antitrust action against a newspaper poses no problem, from a practical standpoint, certain peculiarities of the newspaper industry make it difficult for the government to enforce antitrust laws within this industry. First, newspapers generally operate only in local markets. Thus, contracts or combinations unreasonably restraining trade generally do not affect national markets. Likewise, newspapers rarely have circulation or solicit advertising throughout an entire state, thus confining the relevant geographic market to comparatively small areas.[26]

Secondly, newspapers have dual functions—*i.e.*, they have two "products" to sell:[27] advertising and daily editions of the newspaper. Thus, to define the relevant product markets, separate examinations must be made to determine the anticompetitive effect of a combination.

Finally, the competitors of newspapers vary depending on the situation. For example, if the newspaper is attempting to merge with a radio station, the relevant product market must encompass general advertising, thus placing the radio station in competition with the newspaper within that market, with the result being a section 7 violation due to a merger between competitors, the effect of which is to lessen competition within a line of commerce. On the other hand, if two newspapers are attempting to merge with each other the relevant product market must be drawn more nar-

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23 Associated Press v. United States, 326 U.S. 1 (1945); Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965).

24 326 U.S. 1 (1945).

25 The argument that the first amendment gave newspapers special privileges in antitrust actions was also posed by two later cases. In Lorain Journal v. United States, 342 U.S. 143, 155-56 (1951), the Supreme Court rejected the appellant-publisher's argument that an injunction prohibiting discriminatory practices with regard to certain advertisers of a competing radio station constituted a prior restraint. Likewise, in Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957), the Eighth Circuit rejected appellant's argument that by allowing the antitrust laws to apply to newspapers, the courts were abridging first amendment rights since

> '[a] newspaper is intimidated if it is subject at any moment to prosecution under the Sherman Act whenever it opposes or antagonizes those public officials in power.' 240 F.2d at 665.

26 A good example of this type is the Thomson-Brush-Moore Newspapers, Inc., merger in 1967. There were 35 newspapers involved, but each local market had to be analyzed as to its respective effect on competition. Thus, only one suit was brought by the Justice Department against two of the newspapers in the Canton and Alliance, Ohio, market. Mahaffie, *supra* note 4, at 932. *See* United States v. Thomson-Brush-Moore, 5 Trade Reg. Rep. (1968 Trade Cas.) ¶ 45,067, at 52,665 (N.D. Ohio 1968).

27 Mahaffie, *supra* note 4, at 932. This submarket concept of smaller markets within one larger market has been referred to by unsuccessful antitrust litigants as a "heads I win, tails you lose" proposition. *Id.* at 933.

rowly, again resulting in a violation.[28] Hence, a newspaper may violate the Clayton Act by merging with another form of media because they are considered to be in competition within one product market while a merger with another newspaper may also be a violation because the newspapers are in competition within a narrower submarket.

From the Government's point of view, these considerations compound the already difficult problem of compiling evidence in antitrust litigation. These difficulties may have been a factor in accounting for the scarcity of newspaper antitrust cases.[29] There is, however, one factor which may make newspaper mergers unique economically: some cities simply may be unable to support two competing newspapers. For example, although a small town may be able to support two competing grocery stores, it takes a large city to adequately support two fully competing daily newspapers. Indeed, there are few cities in the United States capable of supporting two commercially competing newspapers. Thus in the absence of a merger or joint operating agreement cities with substantial populations but only one newspaper are not uncommon.[30]

The additional factor that the two newspaper publishing companies involved in *Citizen Publishing* operated under such a joint agreement further sets this case apart. Prior to *Citizen Publishing*, the legality of such an agreement between two newspapers had never before been tested under antitrust principles.

While an agreement of this exact type had never before been presented to the Court, price-fixing has long been considered a per se vio-

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[28] *See* United States v. Times Mirror Co., 274 F. Supp. 606, 617 (C.D. Cal. 1967), *aff'd*, 390 U.S. 712 (1968), where Ferguson, J., stated:

> The daily newspaper business is a distinct line of commerce and is a product separate and distinct from any other product. It has sufficient peculiar characteristics and uses which make it distinguishable from all other products.

[29] In 1963, Arthur B. Hanson, general counsel for the American Newspapers Publisers' Association, testified before the House Subcommittee on Antitrust and stated that there had been only eight important antitrust cases involving newspapers. He listed those cases as: Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); Lorain Journal v. United States, 342 U.S. 143 (1951); Associated Press v. United States, 326 U.S. 1 (1945); Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957); News, Inc. v. Lindsay Newspapers Inc., 1962 Trade Cas. ¶ 70, 398 (S.D. Fla. 1962); Union Leader Corp. v. Newspapers of New England, Inc., 180 F. Supp. 125 (D. Mass. 1959), *aff'd as modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961); United States v. Harte-Hanks Newspapers, Inc., 170 F. Supp. 227 (N.D. Tex. 1959); Greenspun v. McCarran, 105 F. Supp. 662 (D. Nev. 1952). Roberts, *supra* note 4, at 341, citing *Hearings on Concentration of Ownership in News Media Before the Subcomm. on Antitrust of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 4-5 (1963), unpublished transcript on file in subcommittee offices, Washington, D.C., at 260 [hereinafter cited as *House Hearings on Concentration*].

[30] In 1965, there were only 43 cities in the United States in which competing daily newspapers were published. Shortly after the trial, however, there were no cities in the United States in Tucson's present population range (200,000 to 300,000) which had commercially competing newspapers. Brief for Defendant at 14, United States v. Citizen Publishing Co., 280 F. Supp. 978 (D. Ariz. 1968).

lation of the Sherman Act[31] as has market allocation among competitors.[32] While profit-pooling had not specifically been held to be a per se violation, it nevertheless had been condemned as anticompetitive;[33] there was, therefore, no question as to its legality. Thus, a single agreement to fix prices, pool profits, and allocate markets could have been adjudged illegal without an extensive examination of the economic effects of the agreement.[34] However, additional factors presented complications. Since Citizen's acquisition of Star stemmed from an exercise of the 1940 stock option, the acquisition was judged by the facts as they existed in 1940 rather than 1965. Thus, the "failing company" defense was argued as the principal justification for defendants' actions.

The failing company defense was first articulated in *International Shoe Co. v. F.T.C.*,[35] a case involving Section 7 of the Clayton Act prohibiting mergers between competitors that would adversely affect competition between such competitors. In 1921, International Shoe Co. had acquired virtually all the capital stock of the W.H. McElwain Co. Although both companies were engaged in the manufacture and sale of men's dress shoes throughout the United States, the Court found that the two companies did not actually compete because each sold shoes in towns of different size and because McElwain was in serious financial trouble. Justice Sutherland, adopting the rationale of *Standard Oil Co. v. F.T.C.*,[36] applied the rule of reason to the facts of the case and held that there was no violation of Section 7.[37] The underlying criteria for this determination were: (1) lack of anticompetitive intent of the acquiring company; (2) the fact that the acquiring company was the only prospective purchaser; and (3)

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[31] *E.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897). For an excellent discussion of price fixing and the per se rule, see Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division I*, 74 YALE L.J. 775 (1965).

[32] Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 241 (1899). The Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), states, at 26, that where a market division agreement is established among competitors, it is unreasonable (based on the analogy of United States v. Trenton Potteries Co., 273 U.S. 392 (1927)) because of its nature and its necessary effect on competition.

[33] United States v. Northern Sec. Co., 120 F. 721 (8th Cir. 1903), *aff'd*, 193 U.S. 197, 328 (1904). The anticompetitive nature of profit-pooling is obvious: the two companies competed before the agreement and the agreement terminated their competition. United States v. First Nat'l Bank & Trust Co., 376 U.S. 665, 670 (1964).

[34] For a good discussion of the per se rule and the rule of reason, see Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 NW. U.L. REV. 157 (1962).

[35] 280 U.S. 291, 302-03 (1930). However, the defense was alluded to in two prior Sherman Act cases, United States v. United States Steel Corp., 251 U.S. 417 (1920), and American Press Ass'n v. United States, 245 F. 91 (7th Cir. 1917). See note 38 *infra*.

[36] 282 F. 81 (3d Cir. 1922), *aff'd*, 261 U.S. 463 (1923).

[37] For a discussion on this point, see Connor, *Section 7 of the Clayton Act: The "Failing Company" Myth*, 49 GEO. L.J. 84, 86 (1960).

the imminence of a forced liquidation of the acquired company.

In support of this view the Court cited two Sherman Act cases which had applied the rule of reason,[38] thus suggesting, two propositions. First, the failing company defense is available in actions brought under the Sherman Act as well as those brought under the Clayton Act. Secondly, the test to be applied in determining the applicability of the defense is the reasonableness of the acquisition in light of the circumstances of each case. The mere fact that the acquired company is failing is not to be construed as legalizing the acquisition.[39]

In 1950 section 7 was amended[40] to make it unlawful for a merger to lessen competition "in any line of commerce in any section of the country."[41] With the wording thus changed from "lessen competition between such corporations," it became necessary to utilize a rule of reason approach rather than rely solely on the fact that the acquired company was failing.[42] Despite the wording of the amendment, contrary implications have been drawn from the congressional debates on the amendment[43] and it has been suggested by at least one commentator that not only

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[38] United States v. United States Steel Corp., 251 U.S. 417 (1920); American Press Ass'n v. United States, 245 F. 91 (7th Cir. 1917).

In *American Press Ass'n*, a petition was filed by American Press to modify an earlier consent decree which enjoined Western Newspaper Union, a competitor of American Press which had obtained approximately 99 percent of the relevant "ready print" market, from combining with American Press. "Ready print" is newsprint sold to publishers in newspaper-size sheets which has feature material and advertisement already printed on the inside pages. WEBSTER'S THIRD NEW INT'L DICTIONARY 1890 (1961). The petitioner sought to have the consent decree modified to allow Western Newspaper Union to purchase American Press. Reversing the district court's denial of the petition, the Seventh Circuit reasoned that since American Press was experiencing such financial difficulties, the proposed merger would have no injurious effect on the public interest because, regardless of the merger, Western Newspaper ultimately would have 100 percent of the relevant market.

Subsequently, in *United States Steel*, the Supreme Court similarly held that United States Steel's acquisition of a practically worthless company could have no effect on commerce or trade. In fact, the Court found that there would be a legitimate public interest served by the acquisition; there would be "profit . . . to the world." 251 U.S. at 447.

[39] However, subsequent courts apparently failed to read *International Shoe* carefully, because they applied the doctrine as though it required only that the acquired company be failing. *See, e.g.*, Beegle v. Thomson, 138 F.2d 875 (7th Cir. 1943), *cert. denied*, 322 U.S. 743 (1944); United States v. Maryland & Va. Milk Producers Ass'n, 167 F. Supp. 799 (D.D.C. 1958), *aff'd and rev'd in part on other grounds*, 362 U.S. 458 (1960).

[40] According to the legislative history, the 1950 amendment prohibits "the acquisition of the whole or any part of the assets of another corporation when the effect of the acquisition may *substantially lessen competition* or tend to create a monopoly." 15 U.S.C.A. § 18, at 303 (1964) (emphasis added).

[41] The amendment considerably extended the scope of section 7 from the previous language which was directed solely at competition between the merging companies. Clayton Act § 7, ch. 25, § 7, 38 Stat. 631 (1914), *as amended* 15 U.S.C. § 18 (1964).

[42] Connor, *supra* note 37, at 97-98. Mr. Justice Douglas in *Citizen Publishing* noted that the defense may have changed with the 1950 amendment, but did not reach that specific question. 394 U.S. at 136-37 n.3.

[43] In the House, the intent was expressed that the Clayton Act would not apply

did unamended section 7 not require a consideration of the surrounding circumstances, but the amendment likewise did not require such inquiry.[44] Rather it was suggested that only a single criterion, whether the acquired company was failing, was required to be shown to come within the protection of the failing company defense.

It was not until 1962, in *Brown Shoe Co. v. United States*,[45] that the current approach to the failing company doctrine was suggested. Chief Justice Warren, writing the majority opinion in *Brown*, implied that the failing company defense was not a single criterion defense when he observed that Congress in the 1950 amendment intended to preserve the failing company doctrine of *International Shoe*.[46] However, although the altered wording of the amendment ostensibly undercut the single criterion form of the defense[47] the effect of the amendment was not considered again until *Citizen Publishing*.[48]

JUDICIAL ACTION

District Court

Before trial, the Government's motion for summary judgment was granted as to the section 1 violation.[49] After the trial on the merits of the section 2 and section 7 violations, Judge Walsh set forth 197 findings of fact and eight conclusions of law, and then entered the decree requiring divestiture of Star and submission of an operating agreement which eliminated price-fixing, profit-pooling, and market allocation.[50]

The court's first group of findings concerned intent and acts and laid the basic foundation for concluding that the agreement in fact involved sections 2 and 7 violations. The court found that the defendants intended to eliminate competition between themselves by jointly opera-

in bankruptcy or receivership cases. H.R. REP. No. 1191, 81st Cong., 1st Sess. 6-8 (1949). The "belief" was expressed in the Senate that section 7 would not prevent the sale of a failing or bankrupt firm to a competitor. S. REP. No. 1775, 81st Cong., 2d Sess. 7 (1950).

44 Comment, *Failing Company Doctrine: Recent Developments*, 47 TEX. L. REV. 1437, 1448 (1969).

45 370 U.S. 294 (1962).

46 *Id.* at 331 (dicta).

47 Connor, *supra* note 37, at 97-98.

48 Although Justice Douglas stated that he would not consider the relationship between the wording changes in section 7 and the failing company defense (note 42 *supra*), he may have done so nevertheless. This may be inferred from the approach which he took in characterizing the defense. 394 U.S. at 136-39. *See* text accompanyin notes 55-57 *infra*. It has been suggested recently that this narrow application of the failing company defense "may actually result in its more frequent acceptance by the courts." Low, *The Failing Company Doctrine Revisited*, 38 FORD. L. REV. 23 (1969).

49 Brief for Defendant at 7, United States v. Citizen Publishing Co., 280 F. Supp. 978 (D. Ariz. 1968). On October 26, 1965, the district court issued its statement of issues of fact and issues of law for trial, but excluded the sect'on 1 issues. At the pretrial conference on January 24, 1966, the district court explained that the statement of October 26, 1965, in effect, granted summary judgment for the plaintiff. Brief for Defendant at 7, United States v. Citizen Publishing Co., 280 F. Supp. 978 (D. Ariz. 1968).

50 280 F. Supp. at 993-94.

ting the printing, advertising, and circulation departments, and by pooling their increased profits and distributing them at a fixed ratio. The court further found that the defendants intended to attain power over advertising prices in the daily newspaper industry in Pima County, and also determined that the defendants entered into the stock agreement and the operating agreement to acquire control over entry into the daily newspaper industry in the Tucson Standard Metropolitan Area (Pima County). It found further that when Arden acquired Star in 1965, the likelihood of competition being restored between Star and Citizen was effectively eliminated. Moreover, the court decided that in 1940 when the operating agreement was formed, Citizen "was not then on the verge of going out of business, nor was there a serious probability at that time that Citizen Publishing would terminate its business . . . ."[51]—thereby disposing of the failing company defense.

In determining the relevant markets, the court distinguished other forms of communications media such as radio, television and weekly newspapers and found: (1) the daily newspaper market was the relevant product market; (2) Pima County was the relevant geographical market; and (3) the Tucson Standard Metropolitan Area was the appropriate section of the country for purposes of Section 7 of the Clayton Act.

The district court concluded that (1) there had been a per se violation of Section 1 of the Sherman Act due to the price-fixing, profit-pooling, and market allocation under the operating agreement; (2) the defendants acquired monopoly power over the daily newspaper business and conspired to monopolize the daily newspaper market in violation of Section 2 of the Sherman Act; and (3) the 1965 acquisition of Star was a violation of Section 7 of the Clayton Act.

In determining the appropriate remedy, the court concluded that the joint printing and distribution of papers could be accomplished without price-fixing, profit-pooling, and market allocation, and declared that despite some added cost to advertisers, Star and Citizen must have separate advertising and circulation departments. Accordingly, the decree was entered ordering divestiture and elimination of the illegal acts.

Supreme Court

On appeal,[52] the Supreme Court upheld the decision of the lower court.[53] After affirming the long standing principle that price-fixing and

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[51] *Id.* at 980 (finding 17).

[52] 15 U.S.C. 29 (1964) provides "In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

[53] The majority consisted of seven justices: Chief Justice Warren and Justices Black, Douglas, Brennan, White and Marshall with Justice Harlan concurring. Justice Stewart dissented and Justice Fortas did not participate in the consideration or the decision.

market allocation were per se violations of Section 1 of the Sherman Act, the Court, per Justice Douglas, held profit-pooling also to be a per se violation.[54] Considering the failing company defense, the Court noted that it was not necessary to decide whether the lower court was correct in excluding the evidence of the defense on the section 1 charge since that evidence had been admitted on the sections 2 and 7 charges.[55] The Court held that in order for the failing company defense to be applicable the following criteria must be met: (1) the acquiring company must unequivocally and undeniably be faced with the grave possibility of business failure;[56] (2) the acquiring company must prove that it was the only available purchaser; and (3) the acquiring company must prove that the acquired company's prospects of reorganization were "dim or nonexistent."[57] To establish that it was the only available purchaser, Justice Douglas makes it clear that the acquiring company must show that the acquired company made unsuccessful attempts to sell to others.[58]

In the Supreme Court the appellants argued that the rule of reason rather than the per se rule should have been applied to this case of first impression because under the former rule the lower court could have examined the impact that invalidating the operating agreement would

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54 See note 33 *supra*, and accompanying text.

55 Having granted the plaintiff's motion for summary judgment the trial court subsequently excluded evidence on the section 1 charges. 394 U.S. at 136.

56 The district court found as a fact that Citizen Publishing was not on the verge of going out of business in 1940. 280 F. Supp. at 980 (finding 17).

57 394 U.S. at 138. In the recent case of Bowl America, Inc. v. Fair Lanes, Inc., 299 F. Supp. 1080, 1092 (D. Md. 1969), the district court indicated that there were three elements of the failing company defense: (1) a lack of anticompetitive purpose; (2) no other prospective purchaser; and (3) the public interest would be served by the merger. The first element was actually a requirement in *International Shoe*, and is an old Sherman Act test. *See* text accompanying notes 37 & 38 *supra*. Although this element was not discussed in *Citizen Publishing*, the district court specifically found that the defendants had this anticompetitive intent. 280 F. Supp. at 981 (findings 23 & 24). The court in *Bowl America* went on to note that in *Citizen Publishing* "the Supreme Court indicated an unwillingness to extend or expand the failing company defense . . . ." 299 F. Supp. at 1092. However, the court may have extended the defense by ignoring the third requirement of *Citizen Publishing*—that the acquuired company's chances of reorganization be "dim or nonexistent."

58 In his concurring opinion, Justice Harlan asserted that the failing company defense was inapplicable because when the 1953 extension of the agreement was executed, both newspapers were financially healthy. He felt that the defense must be explained in light of the circumstances existing when the operating agreement was extended because without the extension full competition would have been restored in 1965 and "the Justice Department would never have begun the Sherman Act branch of this lawsuit." 394 U.S. at 141.

Justice Stewart, in dissent, disagreed with the majority's second requirement—that in order to prove that it was the only available purchaser, the acquiring company had to show that the acquired company made unsuccessful attempts to sell to others. He argued other evidence should be allowed which would prove that there was no other available purchaser, although he failed to suggest what such other evidence might be. Justice Stewart disagreed with the determination that Citizen was not a failing company in 1940 because he felt that there was a distinction between a failing company and a company going out of business. Advocating a more elastic notion, he felt that a failing company was one that was "dying"—but not necessarily dead. *Id.* at 145.

have on first amendment freedom.[59] Rejecting this argument on the ground that neither news gathering nor news dissemination was governed by the decision but that only the commercial practices were involved, Justice Douglas cited *Associated Press v. United States*[60] for the proposition that the first amendment would be worthless if the federal government was without the power to protect that freedom from private business interests under the antitrust laws.

ECONOMIC, LEGAL AND POLITICAL ANALYSIS

Economic Bases For The Decision

Although throughout the majority opinion there is little indication of the economic basis for the decision, it has been suggested by two leading authorities that the basic underlying policy factor in antitrust decisions is elimination of unreasonable market power.[61] A company is said to have such power when it "can behave persistently in a manner different from the behavior" of a company in a competitive market facing similar cost and demand curves.[62] Not only is it impossible to eliminate all market power in a given situation but such elimination would not necessarily lead to an ideal situation from the Government's point of view. For example, where large amounts of capital are required in an industry it may be undesirable to eliminate all market power since in some situations it could be lessened only at the cost of inefficiently producing small units at higher prices to the consumer.[63] Thus, the goal of antitrust policy is elimination of all *unreasonable* market power. In *Citizen Publishing,* the evidence substantiated the finding that the newspapers had jointly obtained a monopoly in the Tucson Standard Metropolitan Area, thus resulting in unreasonable market power.[64]

A second economic consideration is the extent to which the joint agreement hindered entry into the newspaper market in Pima County. As one authority suggests, there are three factors involved in "barriers to entry" into a market: (1) economies of scale; (2) absolute costs; and (3) product differentiation.[65]

1. Economies of Scale

To pay the high overhead involved in publishing a newspaper, there

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[59] *I.e.,* invalidating the operating agreement might mean elimination of one of the editorial voices. Brief for Appellant at 35-36, Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).
[60] 326 U.S. 1 (1945).
[61] C. KAYSEN & D. TURNER, ANTITRUST POLICY 77 (1959).
[62] *Id.* at 75.
[63] *Id.* at 78.
[64] Between 1940 and 1965 the defendants never ran a promotion to attract new subscribers. 280 F. Supp. at 988 (finding 122).
[65] R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE 22-29 (1967).

must be a relatively large circulation. A new competitor in such a market will have difficulty surviving, primarily due to the high costs coupled with his initial low circulation and advertising revenue. Simply stated, since the fixed costs of plant and equipment are high to all competitors in the market, the new firm will have a more difficult time competing effectively because its average unit cost will be higher than the established publisher with a higher circulation.

2. Absolute Costs

To start even a very small newspaper, the fixed costs have recently been estimated at $150,000.[66] Entry into a large metropolitan area, such as Los Angeles, would probably require several million dollars.[67]

3. Product Differentiation

Even though products may be identical, some consumers still prefer one product over its competitors for some extrinsic reason: its brand name, the shape of its container, or confidence in the product. A new competitor is placed at a disadvantage if he must convince consumers to change their buying habits. The newspaper industry is no exception. Generally, a publisher with a morning edition has a definite advertising advantage due to a larger average circulation.[68] Businesses advertise in the morning in order to reach the largest number of consumers. Therefore, in order to compete effectively, a new entry in the newspaper market may find it necessary to publish a morning edition, thereby meeting the already established morning paper in the market where its customer relationships are already firm.

The presence of substantial barriers to entry is significant in the analysis of the failing company doctrine as it applied to *Citizen Publishing*: after the combination of the two companies, there was no existing newspaper publishing company available for sale in the Tucson market. Thus a propsective competitor would have met all three barriers—high absolute costs, a relatively high average cost curve, and product preference—upon attempting to enter the market. Had Citizen gone through reorganization in 1940 instead of entering into a joint operating agreement with Star, it may have reappeared as a competitor, thereby presenting an existing newspaper for possible sale to an outside publisher. Therefore, in order to preserve an established competitive unit, either by the company successfully undergoing reorganization or through injections

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[66] Roberts, *supra* note 4, at 330, *citing Senate Hearings on S. 1312, supra* note 8, pt. 1, at 401.

[67] Roberts, *supra* note 4, at 330, *citing House Hearings on Concentration, supra* note 29, at 478 (statement of Norman Chandler, publisher).

[68] In 1967, there were 324 morning newspapers in the United States with a total circulation of 24,805,651 (an average of more than 76,000 per morning newspaper) compared with 1,444 evening papers with 36,591,581 circulation (an average of less than 26,000 per evening newspaper). 1967 EDITOR & PUBLISHER YEAR BOOK 15, as cited in *Senate Hearings on S. 1312, supra* note 8, pt. 1, at 528.

of needed capital by an outside purchaser, it is necessary that prior to the permanent elimination of that competitor by a merger the prospects for its reorganization be "dim or nonexistent." Thus, while the Court's third requirement appears at first glance to be overly burdensome, its basis is economically sound.

Notwithstanding the economic policy bases, certainly an important determining factor in the decision was the defendants' purpose in entering into the joint operating agreement.[69] This is apparent from the majority opinion's emphasis on the fact that the purpose of the agreement was to end any business competition between Star and Citizen.[70]

Impact of the Decision

Several important questions are raised by the Supreme Court opinion in *Citizen Publishing.* What impact will the decision have on general principles of antitrust law, on other newspapers operating under joint agreements and, most importantly, on dissemination of news and commentary from a multitude of tongues?

Ostensibly, *Citizen Publishing* departs from prior cases because of its apparent rejection of the notion that the failing company defense is a single criterion exemption from the antitrust laws.[71] Now, the acquiring company must not only prove that the acquired company was failing, but it must also establish that the acquiring company was the only available purchaser and that there was no possibility of the successful reorganization of the acquired company. However, the consideration of the defense in *Citizen Publishing* is actually consistent with previous Supreme Court allusions to the defense[72] and conforms to the original approach of *International Shoe.*[73]

On the other hand, Justice Douglas' characterization of the defense does not follow exactly that of *International Shoe.* In *Citizen Publishing* the first two requirements—only available purchaser and actually

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69 Where a defendant has the intent to restrain trade, the Court has found it much easier to condemn the alleged acts. *See, e.g.,* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223-24 (1940); United States v. American Tobacco Co., 221 U.S. 106, 182 (1911); Standard Oil Co. v. United States, 221 U.S. 1, 74-75 (1911).

70 "[T]o that end the three types of controls were imposed." 394 U.S. at 134 (price-fixing, profit-pooling, and market allocation).

71 Previous cases had often held the defense to be satisfied by a showing that the acquired company was failing. *See, e.g.,* Beegle v. Thomson, 138 F.2d 875 (7th Cir. 1943), *cert. denied,* 322 U.S. 743 (1944); United States v. Maryland & Va. Milk Producers Ass'n, 167 F. Supp. 799 (D.D.C. 1958), *aff'd and rev'd in part on other grounds,* 362 U.S. 458 (1960).

72 United States v. Von's Grocery Co., 384 U.S. 270 (1966); Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. Diebold, Inc., 369 U.S. 654 (1962).

73 For example, in Brown Shoe Co. v. United States, 370 U.S. 294, 331 (1962), the Court observed that Congress demonstrated an intention to preserve the "'failing company' doctrine of *International Shoe Co. v. Federal Trade Comm'n* . . . ." *See* text accompanying note 46 *supra.*

failing company—are carryovers from *International Shoe*;[74] but, the latter case's third requisite of lack of anticompetitive intent is not expressly required in *Citizen Publishing*. Thus, the question arises whether lack of anticompetitive intent is an additional requirement that must be shown by the acquiring company. Conceptually if an acquired company meets the failing company defense criteria of *Citizen Publishing*, anticompetitive intent can have no adverse effect on competition. On the other hand, the damning intent was certainly present in *Citizen Publishing*.[75] Therefore, although the Supreme Court did not include intent as a specific requirement for application of the defense, it cannot be conclusively assumed that in future cases the presence of anticompetitive intent in the acquisition of a failing company will have no effect upon the applicability of the doctrine.[76]

Another question arises as to which offenses the failing company defense applies. In the past, the defense has applied only to violations concerning acquisitions,[77] but after *Citizen Publishing* the question remains open as to whether it may apply to price-fixing, profit-pooling, and market allocation charges as well as to mergers.[78] There are three significant reasons for not extending the defense to section 1 per se violations. First, there is a basic distinction between mergers and section 1 violations: the latter usually serve no purpose except the elimination of competition.[79] However, mergers may serve legitimate purposes such as restructuring of an industry as a defensive move by two smaller companies in order to compete effectively with larger firms in a concentrated industry.[80]

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[74] See text accompanying notes 37 & 38 *supra*.

[75] 280 F. Supp. at 981 (findings 23 & 24).

[76] See Bowl America, Inc. v. Fair Lanes, Inc., 299 F. Supp. 1080 (D. Md. 1969), where the court indicated that lack of anticompetitive purpose was one of the elements of the failing company defense.

[77] *E.g.*, United States v. Diebold, Inc., 369 U.S. 654 (1962); International Shoe Co. v. F.T.C., 280 U.S. 291 (1930); United States v. United States Steel Corp., 251 U.S. 417 (1920) (involving alleged Sherman Act violation for merger); American Press Ass'n v. United States, 245 F. 91 (7th Cir. 1917) (involving alleged Sherman Act violation for merger); and United States v. Maryland & Va. Milk Producers Ass'n, 167 F. Supp. 799 (D.D.C. 1958), *aff'd and rev'd in part on other grounds*, 362 U.S. 458 (1960).

[78] This question is raised by the manner in which Mr. Justice Douglas considered the failing company defense. After discussing only the Section 1 per se violations, Justice Douglas turned to the failing company defense, stating: "[t]he only real defense of appellants was the failing company defense . . . .", thus implying that the defense may be applicable to such violations. 394 U.S. at 133. However, it is not clear whether the Court would have so concluded since in considering the correctness of the trial court in excluding the failing company evidence on the Section 1 charge, the Court did not find it necessary to decide that question because the evidence was admitted on the sections 2 and 7 charges. 394 U.S. at 133. Presumably, if the requirements had been met the question whether the trial court was correct that the defense did not apply to per se violations would have been reached.

[79] United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927).

[80] Brown Shoe Co. v. United States, 370 U.S. 294, 331 (1962).

Secondly, if the defense were allowed to be applied to section 1 per se violations, some of the incentive of the failing company to take all possible steps to reverse a business decline would be removed where that failing company has the security of knowing that if the decline continues, it may be able to fix prices and pool profits with its competitor, thus assuring a continued independent position in the market.[81]

Finally, such an agreement, if sanctioned, could be more detrimental to competition because of its misleading effect.[82] The two corporations would appear to be independent competitors, whereas, in fact, they would be jointly setting anticompetitive prices.

In future cases involving alleged section 7 violations, the burden of proof on the defendant seeking to invoke the failing company defense could be onerous. Even if the first two requirements could be proved by the prospective defendants, failure to prove the third—that the acquired company's prospects for reorganization were "dim or nonexistent"—could mean divestiture.[83] An interpretation problem remains in determining the kind of proof which would be required to show that the prospects of reorganization were "dim or nonexistent."

Although the decision is consistent with stated economic policy, its effect on dissemination of news and editorials may be far reaching. Unlike past cases dealing with freedom of the press and the antitrust laws,[84] this case involved two newspapers which had merged the commercial aspects of their business while retaining *separate* news and editorial departments. It may be in the best interests of the public to allow such arrangements to exist. Due to the many businss failures in the newspaper industry since the turn of the century, many cities have lost the benefit of adverse political views expressed by rival newspapers.[85] No one would

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[81] An agreement which avoids the elimination from the market through the natural forces of competition of a firm which has proven to be ineffective, inefficient, or economically unnecessary is wholly inconsistent with the basic idea of the Sherman Act that

> the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. Northern Pac. R.R. v. United States, 356 U.S. 1, 4 (1958).

[82] *Cf.* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951).

[83] "The prospects of reorganization . . . would have to be dim or nonexistent to make the failing company doctrine applicable to this case." 394 U.S. at 138.

[84] *E.g.*, Lorain Journal v. United States, 342 U.S. 143 (1951); Associated Press v. United States, 326 U.S. 1 (1945).

[85] Judge Learned Hand has commented:

> [The press] serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many that is, and always will be, folly; but we have staked upon it our all. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

deny that the availability of diverse views on political subjects is basic to effective democracy. The two newspapers involved in *Citizen Publishing* are political rivals: the morning *Arizona Daily Star* supporting the general ideals of one of the major political parties and the evening *Tucson Daily Citizen* supporting the other. The editorial climate in Tucson presently is far more healthy than that of its neighbor some 100 miles to the north. In Phoenix both daily newspapers, the morning *Arizona Republic* and the evening *Phoenix Gazette,* are owned by the same publisher, and both have the same editorial, news, and advertising policies. There have been three recent attempts by outsiders to start other daily newspapers in Phoenix, but all have failed.[86] Without a doubt the economic effect of a joint operating agreement between two newspapers is anticompetitive; however, the positive effects of dissemination of news and editorial opinion from diverse sources may outweigh the anticompetitive consequences of such an agreement. Thus, the political undertones may require the adoption of special legislation legalizing such agreements between newspapers.[87]

While the decision may be economically sound and legally consistent with prior decisions, possibly the most important question is left unanswered by the decision: Will competition actually be restored by modifying the operating agreement? If competition is restored, it undoubtedly would be the best possible situation because then there would be complete competition both editorially and commercially. However, if the daily newspaper markets in Tucson, El Paso, Tulsa, and the other cities affected cannot support commercially competing daily newspapers, the risks involved are substantial. Once the downward spiral begins it is difficult to reverse. This downward spiral occurs in the newspaper industry when a newspaper begins to lose money due to loss of advertising.[88] In order to get the lost advertisers back, the paper will lower its advertising rates. This may retrieve some, but will also mean a loss of revenue. Thus, the quality of the paper will suffer as a result of the lowered revenue; this loss of quality will in turn cause the paper to lose more advertisers. The publisher may again try lowering ad rates, with the same result; lower revenue, lower quality of the newspaper, and less advertisers until the newspaper completely fails. With only one newspaper—or two newspapers under single ownership—the subscribers and advertisers in

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86 Brief for Appellee at 39-40, Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

87 *See* text accompanying notes 90-95 *infra.*

88 It is interesting to note that this downward spiral begins with a loss of advertisers due to a lowering in the quality of the newspaper, rather than a loss of circulation as would logically be expected. This is illustrated by the demise of the New York Mirror in 1963. At the time it went out of business, the Mirror had the second largest circulation of any newspaper in the United States; but it could not attract advertisers even through substantially lowered advertising rates. *Senate Hearings on S. 1312, supra* note 8, pt. 2, at 938 (1967). *See* note 18 *supra.*

cities with newspapers presently under joint operations would certainly be in an undesirable position both economically and politically: advertising and circulation rates would be set by one party in addition to there being only one editorial voice. This, of course, would result in a built-in censor, with only the views of the publisher printed.[89] It is therefore obvious that the latter situation would be less desirable than joint operations which include price-fixing, profit-pooling, and market allocation between two editorially competing newspapers.

Several bills have been introduced in the 91st Congress which would exempt newspaper operating agreements from the antitrust laws.[90] The Senate bill passed in 1970[91] proposes to exempt from antitrust violations joint operating agreements either entered into before the effective date of the Act or which have the prior written consent of the United States Attorney General. The bill would make it lawful for these joint operating agreements to include setting of advertising and circulation rates and the distribution of revenues; however, all but one of the joint operating newspapers *must* be failing.

The term "failing newspaper" is defined by the bill as a newspaper which is either in "probable danger of a failure, or . . . appears unlikely to remain or become a financially sound publication."[92] This definition would obviate the three criteria approach of *Citizen Publishing*—Citizen clearly could have qualified as a failing company in 1940 under this definition.

The bill also provides:

> Sec. 5.(a). Any civil action in any district court of the United States in which a final judgment or decree has been entered, under which a joint newspaper operating agreement has been held to be unlawful under any antitrust laws shall be reopened and reconsidered upon application made to such court within ninety days after the date of the enactment of this Act by any party to the contract, agreement, or arrangement by which

[89] The current controversy involving "X" rated movie ads is illustrative. According to the Motion Picture Association of America, Inc., there are 23 newspapers in the United States which will not accept advertisements for these movies. Arizona Daily Star, Dec. 7, 1969, § A, at 25, col. 1. It is interesting to note, however, that only two of the 23 papers are operating under a joint agreement; the remaining 21 newspapers are either under common ownership or are newspapers which are the only newspaper in the city, and can thus choose to publish what they wish with no fear that their competition will take the advertisement. For example, neither the *Arizona Republic* nor the *Phoenix Gazette*, both owned by the same publisher, will accept ads for "X" rated movies. Arizona Daily Star, Dec. 7, 1969, § A, at 25, col. 1. Of the 44 papers operating under joint agreements, only the *El Paso Times* and the *El Paso Herald Post* will not accept the "X" rated movie ads. Letter from Motion Picture Association of America, Inc., to the University of Arizona College of Law, Dec. 23, 1969, on file in the University of Arizona Law Library.

[90] See note 10 *supra*.

[91] S. 1520, 91st Cong., 1st Sess. (1969). The measure passed the Senate by a 63-14 margin. Arizona Daily Star, Jan. 31, 1970, § A, at 19, col. 1.

[92] S. 1520, 91st Cong., 1st Sess. (1969).

> such joint operating agreement was placed in effect . . . . Upon the filing of such application with respect to any such action, any final judgment or decree theretofore entered therein shall be vacated by the court . . . .[93]

Unquestionably, if the House passes the Senate bill the effect upon newspaper joint operating agreements would be substantial. For instance, upon application to the District Court of Arizona, the decree in *Citizen Publishing* would be vacated. Also, any other decree against a joint operating arrangement between newspapers would have to be vacated and by implication any pending antitrust litigation involving newspapers under joint operations would have to be abandoned, provided the criteria of the bill are met.

However, while S. 1520 was pending before the Senate, an amendment supported by the Nixon administration was proposed to limit the exemption to private actions against existing agreements, and to exempt from government action after a six-month moratorium only those joint operating agreements which do not involve price-fixing and profit-pooling.[94] This form of the bill is not as favorable to newspapers and not as conducive to competing editorial voices as that passed by the Senate.

CONCLUSION

The Court has returned the failing company defense to its intended meaning[95] and the apparent meaning conveyed by the 1950 amendment to Section 7.[96] But two questions remain unanswered: is lack of anticompetitive intent a fourth requirement of the defense; and to which actions does the defense apply?[97] The Court will no doubt be called upon to decide these questions in the future.[98]

Although the defendants' joint operating agreement sanctioned price-fixing, profit-pooling, and market allocation, it did allow both newspapers to compete through the editorial voices and news content of their respective papers. While the agreement was clearly anticompetitive, the situation may be justified when one considers that the resulting editorial

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93 *Id.*

94 *Id.*, amendment No. 46, June 18, 1969 (proposed by Senator Edward Brooke of Mass.). The Department of Commerce, on September 24, 1969, announced its support of S. 1520, although not indicating which form of the bill it favored. Airzona Daily Star, Sept. 25, 1969, § B, at 13, col. 1. However, on September 25, 1969, the Justice Department told the House Subcommittee on Antitrust of the Judiciary Committee that it did not favor any antitrust exemption for newspapers. Arizona Republic, Sept. 26, 1969, at 4, col. 1. The official stand of the Nixon adminstration, according to Deputy Attorney General Richard Kleindienst, was support of the amended bill. Interview with Richard Kliendienst, Deputy Attorney General, United States Department of Justice, in Tucson, Arizona, Oct. 17, 1969.

95 *I.e.*, as it was stated by Justice Sutherland in International Shoe Co. v. F.T.C., 280 U.S. 291, 302-03 (1930). See text accompanying notes 35-38 *supra.*

96 See text accompanying note 42 *supra.*

97 See text accompanying notes 74-82 *supra.*

98 See note 78 *supra.*

climate was actually quite healthy.[99] Assuming that this case is representative, should other newspapers combine their business functions rather than ceasing publication entirely or merging with a competitor upon compliance with the restated failing company doctrine, the positive effects to the public in terms of diverse news commentary outweigh the economic detriments. In order to insure the continuation of multiple news reporting in as many cities as possible, Congress should enact the New paper Preservation Act as passed by the Senate on January 30, 1970.[100]

[99] See text accompanying notes 85 & 86 *supra.* See also United States v. Citizen Publishing Co., 280 F. Supp. 978, 988 (D. Ariz. 1968) (finding 124). Although the Supreme Court affirmed the district court's decree, *Citizen Publishing* was not settled until late January, 1970, because the parties had to submit an agreement which would satisfy the decree to the satisfaction of the district court. Three plans for modification of the operating agreement were submitted. The first two were rejected because they included a provision for profit-sharing at a fixed ratio. On January 26, 1970, District Judge James A. Walsh approved the Third Revised Operating Plan for Star, Citizen and Tucson Newspapers, Inc. This third revised plan provides that the two papers may sell combination advertising if it is optional and is calculated by adding the individual rates of the newspapers and subtracting the total cost savings.

The plan also prohibits charging or allocating expenses of common or shared facilities on any basis other than the actual expenses incurred by Star and Citizen. Likewise, revenues must not be distributed on any basis which does not result in Star and Citizen each receiving only those revenues which one derived from its individual operations. Amended Order for Modification of Operating Agreement and Decree of Divestiture, Item No. 254, filed Jan. 26, 1970, as decreed by United States v. Citizen Publishing Co., 280 F. Supp. 978, (D. Ariz. 1968), *aff'd,* 394 U.S. 131 (1969).

The Third Revised Operating Plan, incorporated in the Amended Order for Modification, provides that the two papers may jointly print a Sunday edition. *Id.* This revised plan is to go into effect within 90 days.

The Order for Modification also decreed that the defendants William A. Small, Jr., and Arden Publishing Co. divest themselves of Star within 21 months, either by Arden selling Star's assets or by Mr. Small disposing of all the stock of Arden. The sale must, however, be preceded by 60 days' notice to plaintiff of the agreement of sale. *Id.*

[100] One common argument against passage of any form of the "Failing Newspaper Act" is that because of joint operating agreements, and lack of competition, newspapers generally have not bothered to make technological advances and are now years behind without the ability to compete. Congress, it is argued, should not adopt any special legislation but should force the newspapers to bring their technology up to date in order to make it economically feasible to compete.

While this argument may be persuasive in the long run, it is less persuasive when it is recognized that in the meantime people in many cities must endure one newspaper monopoles while waiting for technological advances to reach the stage at which healthy newspaper competition can be maintained. Also, even if the operating costs could be greatly lowered, there are other barriers to entering the newspaper market. As Professor Caves points out, product differentiation, as well as absolute and average costs, constitute substantial barriers to entry which must be overcome by the new publisher in order to compete with the established publishers. R. CAVES, *supra* note 64, at 27-28. See text accompanying notes 65-68 *supra.*